Rakka @ Kanniah a/l Samayan v Subramaniam a/l Subramaniam & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22-194 OF 1999
HELILIAH MOHD YUSOF J
28 JUNE 2004

Contract — Estoppel — Promissory estoppel — Whether promissory estoppel can be invoked as cause of action

Evidence — Parol evidence rule — Additions to agreement — Whether oral evidence can be adduced to contradict or vary written contract — Sections 91 and 92 of Evidence Act 1950

Evidence — Parol evidence rule — Construction of documents — Construction of documents by reference to parties' understanding – Test to be applied

This is a claim for specific performance. The plaintiff has contended that the plaintiff and defendants had entered into an agreement in respect of the property identified as 19-04-11 Block 19 Jalan 9 (133 Seri Sentosa, Jalan Klang Lama, Kuala Lumpur ('the said property'). Exhibit P1 constitutes the agreement under which the plaintiff has filed his claim against the defendants. The plaintiff's claim is that in 1988, owing to certain financial difficulties encountered by the defendants, it was agreed that the said property would be purchased by the plaintiff. P1 disclosed that the price agreed upon was RM25,000. According to the plaintiff, RM10,000 was paid as an advance or deposit directly to the defendants while the balance was to be paid to the Bank of Tokyo in the form of a payment by instalments towards the loan taken by the defendants to purchase the said property until the full settlement of the loan. The Plaintiff denied knowledge of the property being owned by the first defendant and the second defendant had asserted that the first defendant had all along been representing that the property belonged to him alone. This action has raised the following issues:(1) whether Exhibit P1 was agreement to sell the said property; (2) the conduct of the parties; and (3) the question of the plaintiff relying on the doctrine of promissory estoppel.

Held, granting judgment to the plaintiff:

(1) The authorities show that the inference of the existence of an agreement must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract. In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract (see para 14).

(2) The evidence indicates that for a period of 10 years the property had been managed by the plaintiff who with assistance had undertaken actions consistent with an undertaking that the 'property' had been 'sold', to use the words in P1 itself. Again the evidence of payments

made by the plaintiff to the Bank of Tokyo corroborates what is required under P1 itself (see paras 21 and 22).

(3) The allegations of the defendants are clearly intended to contradict and even vary the contents of P1 and to negate what has been expressly stated in P1. P2 by itself corroborates P1 as to the fact that money in the sum of RM10,000 had passed hands. There is no indication here that the facts as presented fall within any of the circumstances described in the proviso to s 92 of the Evidence Act 1950. In the light of the abovementioned, the evidence of the first defendant that P1 is a 'guarantee' is untenable (see paras 19 and 20).

(4) 'Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact existence of which would destroy the cause of action.' It is highly improbable that the second defendant could not have known at all of the existence of P1 and the silence of the second defendant in allowing the first defendant to represent as to what was stated in plaintiffP1 amounted to the representation by conduct for both (see paras 33 and 35).

[**Bahasa Malaysia summary**

Ini adalah tindakan untuk pelaksanaan spesifik. Plaintif telah menyatakan plaintif dan defendan-defendan telah memasukki satu perjanjian mengenai satu hartanah yang dikenali sebagai 19-04-11 Block 19 Jalan 9 (133 Seri Sentosa, Jalan Klang Lama, Kuala Lumpur (hartanah tersebut). Eksibit P1 adalah perjanjian yang disandar oleh plaintif untuk membawa tindakan ini terhadap defendan. Tuntutan plaintif adalah pada 1988 kerana defendan-defendan mengalami masalah kewangan telah dipersetujui yang plaintif akan membeli hartanah tersebut. P1 menunjukkan harga yang dipersetujui adalah RM25,000. Mengikut plaintif RM10,000 telah dibayar sebagai wang pendahuluan atau deposit kepada defendan-defendan dan bakinya harus dibayar kepada Bank of Tokyo secara bayaran ansuran terhadap pinjaman yang diambil oleh defendan-defendan untuk membeli hartanah tersebut sehingga penyelesaian penuh pinjaman tersebut. Plaintif telah menafikan pengetahuan mengenai hartanah tersebut dimiliki oleh defendan pertama dan defendan kedua telah menegaskan bahawa defendan pertama telah pada semua masa merepresentasikan bahawa hartanah tersebut kepunyaannya sendiri. Tindakan ini telah menimbulkan isu berikut: (1) adakah eksibit P1 adalah satu perjanian menjual hartanah tersebut; (2) tingkahlaku pihak-pihak ; dan (3) soalan mengenai plaintif bersandar pada doktrin estopel janjian.

Diputuskan, memberi penghakiman kepada plaintif:

(1) Otoriti-otoriti menunjukkan bahawa penyimpulan mengenai kewujudan satu perjanjian harus dibuat melalui bahasa yang

digunakan oleh pihak-pihak,tingkahlaku mereka, dengan mengambil kira keadaan persekitaran, dan objek kontrak tersebut. Dalam lain kata, untuk memastikan niat pihak-pihak,mahkamah akan, secara am, menggunakan ujian objektif; secara khususnya, ia akan tanya dirinya, apakah niat orang–orang yang munasabah jika mereka berada di tempat pihak-pihak kepada kontrak yang dinyatakan (lihat perenggan 14).

(2) Keterangan menunjukkan bahawa untuk tempoh 10 tahun hartanah tersebut telah diuruskan oleh plaintif dan dengan bantuan telah melakukan tindakan yang konsisten dengan hartanah tersebut telah 'dijual' mengikut perkataan yang digunakan dalam P1 sendiri. Sekali lagi bukti pembayaran yang dibuat oleh plaintif kepada Bank of Tokyo menyokong apa yang diperlukan di dalam P1 (lihat perenggan 21 dan 22).

(3) Tuduhan defendan-defendan jelas adalah untuk mencanggah dan mengubah isi kandungan P1 dan untuk menyangkal apa yang telah dinyatakan secara bertulis di dalam P1. P2 sendiri menyokong P1 mengenai fakta wang sebanyak RM10,000 telah tukar tangan. Tiada sebarang indikasi mengenai fakta yang dibentangkan jatuh dalam sebarang keadaan yang dinyatakan di dalam proviso kepada s 92 Akta Keterangan 1950. Maka, keterangan defendan pertama bahawa P1 adalah 'jaminan' tidak dapat dipertahankan (lihat perenggan 19 dan 20).

(4) Estopel adalah bukan satu kuasa tindakan. Ia mungkin boleh (jika dibuktikan) menolong plaintif untuk menguakuasakan satu kuasa tindakan dengan tidak benarkan satu defendan menafikan kewujudan fakta yang penting untuk membuktikan satu kuasa tindakan, atau (dalam lain kata) dengan tidak benarkan defendan dari menegaskan kewujudan sesuatu fakta yang akan binasakan kuasa tindakan tersebut. Ia adalah besar tidakkemungkinan bahawa defendan kedua tidak tahu langsung mengenai kewujudan P1 dan tindakan defendan kedua dengan berdiam diri dan membenarkan defendan pertama untuk representasi mengenai apa yang dinyatakan di dalam P1 bersamaan dengan representasi melalui tingkah laku oleh kedua-dua mereka (lihat perenggan 33 dan 35).

Notes

For cases on promissory estoppel, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3116–3120

For cases on the parole evidence rule, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1805–1928

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd).

Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 344 (refd).

A *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 (refd)
Hong Leong Leasing Sdn Bhd v Tan Kum Cheong [1994] 1 MLJ 177 (refd)
McCutcheon v David MacBranye Ltd [1964] 1 WLR 125 (refd)
Pasuma Pharmacal Corpn & McAlister & Co Ltd [1965] 1 MLJ 221, FC (refd)
Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 784 (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 451 (refd)
B *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155 (refd)
Spiro v Lintern [1973] All ER 319 (refd)
Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 (refd)

Legislation referred to

C Contracts Act 1950 ss 10, 24, 79, 80
Evidence Act 1950 ss 91, 92
Specific Relief Act 1950 ss 2(2)(b), 11(2), 20(1)(a), 21

Blanche Oleary (Blanche & Kayveas) for the plaintiff
SG Lingam (Radha Davi with him) (SG Lingam & Co)for the defendants
D

Heliliah Mohd Yusof J:

[1] In this claim for specific performance, the plaintiff has contended that the plaintiff and defendants had entered into an agreement in respect of the property identified as 19-04-11 Block 19 Jalan 9 (133 Seri Sentosa,
E Jalan Klang Lama, Kuala Lumpur ('the said property'). Exhibit P1 in the agreed bundle of documents constitutes the agreement under which the plaintiff has filed his claim against the defendants.

[2] The plaintiff's claim is that in 1988, owing to certain financial difficulties encountered by the defendants it was agreed that the said
F property would be purchased by the plaintiff. Briefly P1 disclosed that the price agreed upon was RM 25,000. According to the plaintiff RM 10,000 was paid as an advance or deposit directly to the defendants, while the balance was to be paid to the Bank of Tokyo in the form of payment by instalment. Apparently the defendants had obtained a loan from the
G aforesaid bank for the purpose of purchasing the property and the contention of the plaintiff was that it was agreed that the plaintiff would continue to service the loan until its full settlement.

[3] According to the plaintiff it was agreed that upon receiving RM10,000 the defendants had agreed within a week to conclude an
H agreement. Nevertheless, according to the evidence led by the plaintiff, it was only after a visit to the defendants in Ipoh that the document P1 was finally obtained.

[4] This action has raised the following matters:

(i) is P1 an agreement to sell;

I (ii) the conduct of the parties;

(iii) the question of estoppel.

[5] P1, the disputed agreement, is reproduced as follows : **A**

x x x x
SELF LABELS ENTERPRISE
2E JALAN TAI WUI TONG, MERDEKA GARDEN **B**
30100 IPOH, PERAK
TEL: 05 536930

Our Ref:

Your ref: Date: 11-12-88 **C**

Mr. Rakka @ Kanniah a/l Samayan
No. 2, Block 62,
Rumah Panjang
Pantai Dalam,
Kuala Lumpur **D**

Dear Sir,

Re: Block 2/ Level 5/11, Sri Sentosa **E**

I, Subramaniam a/l Subramaniam already sold the Low Cost House to Mr. Rakka @ Kanniah for the price of M$25,000.

I have already been collected M$10,000 (Ten Thousand dollars) from Mr. Rakka Kanniah on 13-5-88. **F**

The balance of the amount will be paid by him to The Bank of Tokyo Ltd., Kuala Lumpur, every monthly of RM$ 152.79.

Approved by:	Agreed by:
	G
Sgnd.xxx	Sgnd. xxx
Subramaniam a/l Subramanian	Rakka Kanniah a/l Samayan

H

[6] Bearing in mind that in the contents of P1 expressed in English the word used is 'sold', the defendants contend that P1 is a 'jaminan'. The point to begin with is the meaning to be given to the word 'sold' as found in P1, the contention of the defendants is also founded on the basis that there is nothing found in P1 which expressed the completion date. In my view this document is not to be equated with a sale and purchase agreement from a developer or a company where several units are sold to individual purchasers. It would appear that this was a case where the defendants had **I**

purchased in that area a certain lot by obtaining a loan under joint names. Counsel for the plaintiff has made a reference to s 10 of the Contract Act 1950 (Act 136) where 'All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.'

[7] Firstly it is necessary to construe P1. The word to be noted is the word 'sold' bearing in mind that the document is typed in English, Lord Diplock in *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 784 said:

> The object sought to be achieved in construing any contract is to ascertain what the mutual intention of the parties was as to the legal obligation each assumed by the contractual words which they sought to express them.

[8] Lord Reid in *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 approved the following quotation:

> The judicial test is not to discover the actual intentions of each party. It is to decide what each was reasonably entitled to conclude from the attitude of the other.

[9] Sir John Davidson MR gave a rather more cynical explanation of the unimportance of the actual intentions of the parties in *Summent Investment v Port Steel Corp*. The actual intentions are happily irrelevant since, were it otherwise, many, and perhaps most, disputes of construction would be resolved by the fact that the parties were not *ad idem*.

[10] In the present case, there are words or expression which, if taken together, suggest that there was no intention to create a legal relationship other than within the terms of s 10 of the Contract Act 1950. P1 is not to be placed on parity with a sale and purchase agreement involving a developer. DW1 admitted that he understood the contents of P1 and yet asserted in the face of it that the document is a 'jaminan'.

[11] If then it is true that there was intended a loan, nowhere in the documents itself are discernible expressions which could qualify to fall within the terms of s 79 of the Contract Act 1950. A perusal of the illustrations under s 80 of the Act would suffice to negate the allegations that the contents of P1 constitute a 'jaminan' as it is not even addressed to the bank.

[12] With regard to the preparation of the documents, there is conflicting evidence between the evidence of the plaintiff on the one hand and the evidence of the defendants on the other. However, I am of the view that the evidence of DW1 and DW2 is credible.

[13] On the evidence disclosed, I do not believe that DW1 was the one who typed the documents. Irrespective of the fact that both DW1 and DW2 in their evidence stated that they both know English. However, DW2 herself had admitted that she not only spoke English but she admitted to communicating with her husband in English. Moreover in her own evidence she was the one who admitted to the fact that she knows how to type and that was not controverted.

[14] Both DW1 and DW2 in their own evidence showed that both knew English. PW1 had stated that DW2 read out the contents and that DW1 stated something in Tamil about the contents of the documents to PW1 and PW2 at that material time. In *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 at p 764 Edgar Joseph Jr SCJ cited the following which I find useful to refer to:

> In *Smith v Hughes* (1971) LR 6 QB 597, [1861-73] All ER Rep 632, it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be *ad idem,* ie, there must be a consensus between them. But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his digestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.
>
> In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.
>
> As clear and helpful an enunciation of the principles as any which should guide the court in determining the ever-recurring question of whether there has been a contract between the parties is provided by Saville J in *Vital BV v Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep 574 at p 576 in the following words:
>
> > The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them – and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In come crises, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that theparties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

[15] Learned counsel for the defendants has made a reference to the case of *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290. This necessitated a consideration of s 91 and s 92 of the Evidence Act 1950. Before doing so, reference should also mode s 24 of the Contracts Act 1950 where one of the illustrations is as follows, ie illustration (a):

> (a) A agrees to sell his house to B for 10,000. Here, B's promise to pay the sum of $10,000 is the consideration for 'A's promise to sell the house and A's promise to sell the house is the consideration for B's promise to pay the $10,000. These are lawful consideration.

[16] DW1 has admitted himself that there is P1. What is denied is who actually prepared the document P1. DW1 does not dispute that he signed P1 although the contents are denied. This evidence and the allegations of DW1 and DW2 of the purport of P1 have to be examined in the context of s 91 of the Evidence Act 1950 which states:

> When the terms of a contract … or of any other disposition of property have been reduced … to the form of a document … no evidence shall be given in proof of the terms of the contract … except the document itself or secondary evidence of its contents in cases in where secondary evidence is admissible under the provision hereinbefore contained.

[17] This section has to be taken with the three explanations and illustration (a) would be applicable to the present case before.

[18] In addition, the provision of s 92 which is relevant states:

> when the terms of any such contract have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument for the purpose of contradicting, varying, adding to or subtracting from its terms.

[19] The allegations of DW1 and DW2 are clearly intended to contradict and even vary the contents of P1 and to negate what has been expressly stated in P1. P2 by itself corroborates P1 by the fact that money in the sum of RM10,000 had passed hands. There is no indication here that the facts as presented fall within any of the circumstances described in the proviso to s 92.

[20] In the light of the abovementioned, I hold the view that the evidence of DW1 that P1 is a 'jaminan' is untenable.

[21] I turn next to the question of the conduct of the parties. The evidence before me indicates that for a period of 10 years the property had been managed by PW1 who, with assistance, had undertaken actions which were consistent with an undertaking that the 'property' had been 'sold' to use the words in P1 itself.

[22] Although some explanation has been afforded to the effect that the reliance of trust of family between PW2 and DW1 had caused DW1 and DW2 to leave the matters in the hands of PW1 and PW2, again the evidence of payments made by PW1 to the Bank of Tokyo corroborates what is required under P1 itself. In effect I hold the view that the evidence relating to the occupancy of the premises by some tenant at a certain point of time or other is again an attempt to support the allegation that the property had not been disposed of and that whatever had been obtained from the rental would also be utilised towards payment of the sums owing to the Bank. Nowhere in P1 is it stated how the balance of RM25,000 was to be paid and neither was there any indication payment was to be derived from a specific source. I hold that this part of the evidence is also irrelevant for the purposes of controverting the nature of the transaction entered into.

[23] Learned counsel for the defendants had alluded to the question of hardship. In my view it is useful to consider whether the conduct of the

plaintiff has in any way contributed to the alleged hardship. It should be considered whether under the circumstance the plaintiff has taken unfair advantage of the defendants or acted in some manner which could be said to represent an 'unconscionable bargain'. This does not appear to be a case where the plaintiff took advantage of some weakness in the personal competence of the defendants. Since there are allegations of unfair practice, the statement of defence states inter alia:

> Sekitar tahun 1988 Defendan Pertama menghadapi masalah kewangan di dalam perniagaan dan meminta pinjaman wang daripada kakak Defendan Pertama …

[24] As against this, PW1 states:

> Sebenarnya saya tidak sangka bahawa defendan-defendan akan menipu saya dan isteri saya … Dalam tahun 1988 kedua-dua defendan telah melawat kami di Kuala Lumpur dan berbincang mengenai harta mereka di Kuala Lumpur dan suruh untuk menjaga harta itu sebab mereka tinggal di Ipoh.

[25] As I stated earlier, the court does not accept the oral evidence that was added to controvert the terms of the documents as to the alleged purpose for which P1 was signed. The hardship that was referred to at the time of the signing of P1 was the financial difficulty which, according to DW1, money was required for his business. PW2 stated inter alia:

> … sebenar kita semua itu adalah saya, isteri saya, suami saya dan saya sekeluarga telah berbincang mengenai rumah itu dan adik saya kata dia tidak mahu rumah itu sebab susah untuk dijaga dari Ipoh.

[26] It is borne out here that in 1988 the defendant DW1 had encountered difficulty and money was required. But it was admitted in evidence that from 1988–1998 the defendants had not made payments towards the bank.

[27] If the court were to consider the question of advantage, the probability of the defendants taking advantage of the situation through their lack of education or literacy in language is there. The conduct throughout the ten years simply cannot explain away that in addition to RM10,000 having passed hands, PW2 was in fact made to pay to the bank, maintain the property and in addition be responsible for the payment of quit rent. The conduct of the defendants negate their allegations of the 'jaminan' with no further evidence whether the alleged loan of RM10,000 will be returned. The defendants cannot now have a change of mind because of the probability of the property being appreciated in value. I do not think that the fact that the plaintiff was in a stronger bargaining power at the time of the signing of the document can be deemed as misconduct in the absence of evidence, as opposed to allegations.

[28] On the evidence the plaintiff showed that he had kept his part of the bargain in paying to the Bank, except for the occasions as explained, when the plaintiff was advised not to do so by the plaintiff's solicitors. On the other hand, the eagerness of the defendants to settle offer payments was only displayed during the period when full payment was nearing completion. The effort to make payments was in fact disclosed after P4 was sent.

[29] The overall conduct of DW1 and DW2 is the basis upon which the plaintiff asserts the right under P1 to have the premises transferred. Since I have earlier held the view that DW2 typed the document, I need no longer make any further pronouncement other than to state that she had acquiesced in the arrangement.

[30] Nevertheless, while the plaintiff is adamant in stating the absence of knowledge that the property was held by both the husband and wife, the receipts in the quit rents certainly disclosed one name and another and so did the receipts from the bank. The evidence therefore really points to the situation that at the time P1 was executed, DW1 had stated that it was passed on to PW1. But it was not specific as to when the passing was done. If PW2 was not very literate, and if PW1 was in fact made to sign, then it must have been on some statements or representations of fact made by DW1 himself, even assuming that it is still acceptable that DW2 was not present as claimed. If DW1 himself as claimed had indeed himself prepared P1 then my view is that now he is bound by it.

[31] In *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, which dealt with the question of promissory estoppel, the following is the decision of the Court:

Mason CJ and Wilson J in a joint judgment observed:

> 'There has been for many years a reluctance to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future. Promissory estoppel, it has been said, is a defensive equity and the traditional notion has been that estoppel could only be relied upon defensively as a shield and not as a sword. ... *High Trees* [1947] KB 130 itself was an instance of the defensive use of promissory estoppel. *But this does not mean that a plaintiff cannot rely on an estoppel.* Even according to traditional orthodoxy, a plaintiff may rely on an estoppel if he has an independent cause of action, where in the words of Denning LJ, the estoppel 'may be part of a cause of action, but not a cause of action in itself.' (Emphasis added.)

Brennan J observed as follows:

> 'It has been said that estoppel in pais is merely a rule of evidence and not a cause of action but that proposition needs some explanation. If the estoppel relates to the existence of a contract between the parties, the legal relationship between the parties is ascertained by reference to the terms of the contract which has been assumed to exist. If, in the assumed state of affairs, the contract confers a cause of action on the party raising the estoppel, the cause of action may be enforced. The source of legal obligation in that event is the assumed contract; the estoppel is not a source of legal obligation except in the sense that the estoppel compels the party bound to adhere to the assumption that the contract exists'

His Lordship continued: 'Why should an equity of the kind to which *Combe v Combe* [1951] 2 KB 215 refers be regarded as a shield but not a sword?'

Dean J who delivered a separate judgment observed:

> 'It has often been said that estoppel can be used only as a shield and not as a sword. In so far as estoppel by conduct is concerned, that statement is generally true only in the very limited sense that such an estoppel operates negatively to

preclude the denial of, or a departure from, the assumed or promised state of affairs and does not of itself constitute an independent cause of action. The authoritative expositions of the doctrine of estoppel by conduct (or, in more obscure language, in pais) to be found in judgments in this court have been consistently framed in general terms and lend *no support for a constriction of the doctrine in a way which would preclude a plaintiff from relying upon* the assumed or represented mistaken state of affairs (which a defendant is estopped from denying) as *the factual foundation of a cause of action* arising under ordinary principles of the law. There is no basis in principle for such a constriction of the doctrine. In so far as decisions or *statement in judgments in cases in other courts would support a contrary view, they should not be accepted in this country.* (Emphasis added.)'

[32] The question of estoppel has been discussed in *Hong Leong Leasing Sdn Bhd v Tan Kum Cheong* [1994] 1 MLJ 177. Visu Sinnadurai J (as he then was) observed:

Estoppel: shield or sword

The question as to whether estoppel may be invoked as a cause of action whether it is always raised as a defence was not canvassed before this court ... I, therefore need to make no findings on this issue. However, as this point was alluded to by the plaintiff during the trial, I venture to make some observations on this point of law.

As pointed out earlier, the more common situations where estoppel is raised is by way of a defence. As it is often said: estoppel cannot be used as a sword but only as a shield. For example, in the cases that have been referred to in this judgment relating to the application of estoppel in hire purchase agreements, estoppel was not pleaded by the plaintiff but by the defendant. For example, in *Moorgate Mercantile Co v Twitchings* [1975] 3 All ER 314, the defendant pleaded estoppel against the plaintiff on the ground that the plaintiff was estopped from asserting their title to the car against the defendant; whereas in Lowe *v Lombank Ltd* [1960] 1 All ER 611, estoppel was pleaded against the plaintiff, the hirer, when she brought an action against the bank, on the ground that she had signed a delivery receipt stating that the car was in good order and condition.

But, be that as it may, the decision of the High Court of Australia in 1988 has now added a new dimension to the issue as to whether estoppel can be used as only a shield and not as a sword. The High Court of Australia in the case of *Walton Stores (Interstate) Ltd v Maher* [1988] 164 CLR 387, provides a broader view of the application of estoppel by the plaintiffs.

[33] In the Federal Court decision in *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 344, Gopal Sri Ram JCA addressed the issue as follows:

We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine *in this* context is that stated by Lord Russell of Killowen in *Dawsons Bank v Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at page 108:

'Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.'

[34] In the judgment, reference had been made by his Lordship to the case of *Spiro v Lintern* [1973] 3 All ER 319 which has also been invoked by learned counsel for the plaintiff in her submission relating to the conduct of DW1. PW1 and PW2 have denied knowledge of the property being owned by DW1 and DW2 has been asserting that DW1 had all along been representing that the property belonged to him alone.

[35] I have already made a finding that on the evidence DW2 was the person who typed the letter and not DW1 as claimed. Even if it is true here that DW1 was actually the person to type the letter, it was his duty to ensure that the document P1 was also signed by DW2. Assuming that the court accepts that the document constitutes a 'jaminan' it is tantamount to stating that if the document is a 'jaminan' it would not be necessary for DW2 to sign. On the evidence, the conduct of both DW1 and DW2 amounted to conduct which led PW1 and PW2 to believe that DW1 was in a position to dispose of the property. I find that it is highly improbable that DW2 could not known at all of the existence of P1, and the silence of DW2 in allowing DW1 to represent on what was stated in P1, amounted to representation by conduct for both.

[36] Learned counsel for the defendants has alleged that the plaintiff had failed to show that there was a term in P1 to indicate that title was to be transferred. The Federal Court in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 451 has in the judgment of Pen Swee Chin FCJ explained:

> Implied terms are of three types; the first and most important type is an implied term which the court infers from the evidence that the parties to a contract must have intended to include in their contract though it has not been expressly set out in the contract

[37] The approach applied in the *Sababumi* case had earlier already been applied in the Federal Court decision of *Pasuma Pharmacal Corpn & McAlister & Co Ltd* [1965] 1 MLJ 221, FC.

> **Terms implied by law.** The implication of a term is a matter of law for the court, and whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. In many classes of contract, however, implied terms have become standardised, and it is somewhat artificial to attribute such terms to the unexpressed intention of the parties. The court is, in fact, laying down a general rule of law that in all contracts of a defined type – for example, sale of goods, landlord and tenant, employment, the carriage of goods by land or sea – certain terms will be implied, unless the implication of such a term would be contrary to the express words of the agreement. Such implications do not depend on the intentions of the parties, actual or presumed, but on more general considerations.

[38] If property is said to be sold then the term to be implied is that it is to be transferred.

[39] On the question of hardship, the Supreme Court in *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155 addressed the issue as follows:

In *Sale and Purchase of Real Property* Professor Visu Sinnadurai observes that specific performance is a discretionary remedy and over the years the courts have spelt out the circumstances under which the relief may not be granted. These equitable principles are reflected in ss 20 and 21 of the Specific Relief Act. Section 20(l)(a) provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation in money. As Professor Sinnadurai correctly pointed out at p 436, this provision has to be read with some reservation in dealing with contracts for the sale and purchase of property. Section 11(2) clearly says that there is a presumption that in contracts for the sale of immovable property monetary compensation cannot be an adequate remedy. It was further shown that s 20(1)(a) is of general application while s 11(2) deals specifically with contracts for the sale of land. It is therefore right that s 11(2) will prevail in cases involving contracts dealing with sale and purchase of property. He concluded his observation thus:

> '... The effect of these two sections is that it is for the defendant to establish that the plaintiff would be adequately relieved by an award for damages and that specific performance should not be granted. This burden of proof on the defendant is a heavy one and if he fails to satisfy the court of the adequacy of damages, the court will generally grant the relief to the plaintiff unless there are other special grounds against granting it.'

Under s 2(2)(b) the courts may refuse to grant the relief of specific performance to the plaintiff if the granting of it would involve some hardship on the defendant which he did not foresee. Each case must be decided on its particular facts. In *RM Venkatachalam Chettiar & Ors v NKR Arunasalam Chettiar* Thomson J, as he then was, held that no great hardship would be caused to the vendor's representative to complete the transaction even if it would incur some unanticipated expenditure. In *Haji Osman bin Abu Bakar v Saiyed Noor bin Saiyed Mohamed* specific performance was granted. The court rejected the argument that hardship would be caused to the beneficiaries if such an order was granted. The appellant in *Patel & Anor v All & Anor* was successful in her appeal against an order of specific performance on ground of hardship. There was in that case a period of more than four years' delay and it would B be just to leave plaintiffs to their remedy in damages. In *Johnson & Anor v Agnew* the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained an order for specific performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded ab initio but remained in existence until it was terminated by the court.

Finally, the New Zealand case of *Nicholas v Ingram* where the defence was based solely on financial inability to complete. We refer to the headnotes. In an action for specific performance of a contract for the sale of land, hardship on the part of the defendant may operate as a defence. But the hardship must, in general, be such as existed at the time of the contract and not such as has arisen subsequently from a change of circumstances.

[40] It is noted however that the statement of defence has not specified what is the hardship and neither has it been proved in evidence. The alleged hardship was the argument raised by counsel for the defendants in the course of his submission.

[41] For the reasons that I have stated above, the plaintiff is entitled to the specific performance prayed for. The defendants are to transfer to the plaintiff the said property upon the plaintiff paying whatever form of outstanding charges to the Bank, and should there be a failure or refusal to do so by the defendants, it is also ordered that the Senior Assistant Registrar of the High Court be empowered to exercise the transfer of the said land to the plaintiff on behalf of the defendants.

[42] Costs to follow the cause.

Judgment granted to the plaintiff.

Reported by AG Kalidas